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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOB REDD,

Petitioner,

v.

WALTER ZANT,
SUPERINTENDENT,
GEORGIA DIAGNOSTIC
AND CLASSIFICATION
CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under Georgia law, when an accused has received a sentence of death and has had the punishment set aside, may the trial court at the resentencing proceedings instruct the jury on all statutory aggravating circumstances supported by the evidence?

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STATEMENT OF THE CASE

Petitioner, Bob Redd, was indicted in Augusta, Richmond County, Georgia, in 1976 for the kidnapping and murder of Paul D. Eskew, Sr. The evidence showed that Redd abducted Eskew, drove away in an automobile, and while Eskew pleaded to be returned slashed him in the face with a knife. Shortly thereafter, having turned off onto a dirt road, petitioner took a tire tool and hammer from the trunk of the automobile and mercilessly beat Eskew in the head and face. Not yet content, petitioner slashed the victim's throat twice.

Forcing his young companion, John Morris, who was borderline retarded, to assist him, Redd dragged the body behind the tree where he undressed it and commenced slashing the victim's buttocks with a knife while cursing the dead man.

Months later, a badly decomposed body was found and ultimately identified as Eskew.

Petitioner was originally convicted and sentenced to death. On mandatory appeal to the Supreme Court of Georgia the conviction was affirmed but the death penalty was vacated. Redd v. State, 240 Ga. 753, 243 S.E.2d 16 (1978).[1/] Redd was retried on the issue of punishment and resentenced to death. Again, the Supreme Court of Georgia performed its mandatory statutory review, this time affirming the death penalty. Redd v. State, 242 Ga. 876, 252 S.E.2d 383 (1979). On June 11, 1979, this Court denied the petition for a writ of certiorari. Case No. 78-6462.

1/ The death sentence was set aside "for failure of the trial court to make clear to the jury in his charge taken as a whole that they might in their discretion recommend a life sentence even if they found the existence of a statutory aggravating circumstance." Redd v. State, 240 Ga. at 757. Therefore, the state was not precluded from again seeking the death penalty.

Redd thereafter sought habeas corpus relief in state courts and it was denied. His application for a certificate of probable cause to appeal to the Supreme Court of Georgia was also denied. On November 3, 1980, this Court again denied Redd's petition for a writ of certiorari. Case No. 80-5317.

Redd filed a second state habeas corpus petition following this Court's decision in Bullington v. Missouri, ___U.S.___, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The state habeas corpus court granted relief. On appeal, the Supreme Court of Georgia reversed, reinstating the death penalty. It is from this decision that Redd has filed his petition in this Court for a writ of certiorari.

REASONS FOR NOT GRANTING THE WRIT

I. UNDER GEORGIA LAW, WHEN AN ACCUSED HAS RECEIVED A SENTENCE OF DEATH AND HAS HAD THE PUNISHMENT SET ASIDE, THE TRIAL COURT IS NOT ONLY AUTHORIZED BUT REQUIRED AT THE RESENTENCING PROCEEDINGS TO INSTRUCT THE JURY ON ALL STATUTORY AGGRAVATING CIRCUMSTANCES SUPPORTED BY THE EVIDENCE.

The issue presented to this Court was presented below both to the state habeas court and to the Supreme Court of Georgia on appeal. The state supreme court recounted the following procedural history:

> In June of 1981, Redd filed a habeas corpus petition in Butts County Superior Court alleging that on resentencing the consideration by the jury of certain statutory aggravating circumstances was in violation of the double jeopardy clause.
>
> At Redd's first sentencing trial, three aggravating circumstances were submitted to the jury. The jury imposed the death sentence but only listed one aggravating circumstance in support thereof.
>
> The second sentencing jury was authorized to consider four aggravating circumstances

> -- the three submitted to the first jury plus an additional one the judge felt was supported by the evidence.

Zant v. Redd, ___Ga. ___, 290 S.E.2d 36 (1982). Specifically, at the first trial the jury was authorized to consider (1) that the murder was committed during the commission of kidnapping with bodily injury (Ga. Code Ann. § 27-2534.1(b)(2), (2) that the murder was outrageously or wantonly vile or inhuman in that it involved torture, or depravity of mind, or an aggravated battery (Ga. Code Ann. § 27-2534.1(b)(7), and (3) that the murder was committed during the commission of an armed robbery (Ga. Code Ann. § 27-2534.1(b)(2).

> . . . In recommending the sentence of death, the jury listed only one of the three aggravating circumstances that were charged by the trial judge-- the offense of murder was committed while defendant was engaged in the commission of another capital felony, kidnapping with bodily injury.
>
> Upon resentencing, the trial court charged that the jury was authorized to consider the same three statutory aggravating circumstances as listed above. [The jury was also authorized to consider upon resentencing the additional statutory aggravating circumstance, that the offense of murder was committed for the purpose of receiving money. Ga. Code Ann. § 27-2534.1(b)(4).] The jury recommended

> sentencing [Redd] to death but this time listed in support thereof two statutory aggravating circumstances; one which the jury found to exist at the first trial of the case -- the offense of murder was committed while defendant was engaged in the commission of another capital felony, kidnapping with bodily injury; the other being one that was previously charged at the first trial but not listed by the jury in support of the death sentence imposed in that case -- the offense of murder was outrageously or wantonly vile, horrible or inhumane [sic] in that it involved torture, depravity of mind or an aggravated battery.

Redd v. State, 242 Ga. 876, 883-84, 252 S.E.2d 383 (1979).

In his second state habeas corpus petition Redd relied on this Court's recent decision in Bullington v. Missouri, ___U.S.___, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), alleging that he had been "acquitted" of the two statutory aggravating circumstances not listed on the verdict of the first jury.

In Bullington, at the original trial on sentencing, the jury, apparently finding no aggravating circumstances, imposed a life sentence. The accused obtained a new trial as to guilt, and this Court held that the prosecution could not again seek the death penalty because jeopardy had attached.

> . . . Given these considerations, our decision today does not at all depend upon the State's announced intention to rely only upon the aggravating circumstances it sought to prove at petitioner's first trial or upon its statement that it would introduce no new evidence in support of its contention that petitioner deserves the death penalty. Having received "one fair opportunity to offer whatever proof it could assemble," Burks v. United States, 437 U.S., at 16, 57 L.Ed.2d 1, 98 S.Ct. 2841, the State is not entitled to another.

Bullington v. Missouri, 68 L.Ed.2d at 283. The Supreme Court of Georgia has similarly held that a death penalty is disproportionate if imposed on an accused who received a life sentence at a previous trial. Ward v. State, 239 Ga. 205, 208-09, 236 S.E.2d 365 (1977). Ward was not decided on double jeopardy grounds.

Thus, Bullington is not, as petitioner has asserted, "on all fours" with the present case. Redd was not "acquitted," if that is the appropriate term, at the sentencing phase of his trial. On the contrary, based upon the evidence before it, the jury sentenced Redd to death. Whereas this Court in Bullington found the trappings of a sentencing trial in a capital case to be similar to a trial on guilt or innocence, thus finding jeopardy where one previously has been sentenced to life rather than death, this case presents no such circumstance. Rather, the sentencing jury at Redd's original trial not only found evidence to convict but evidence sufficient to impose the death penalty. Therefore, there is no question of jeopardy having attached in the sense of prohibiting a subsequent death penalty from being imposed.

Neither does Bullington hold particular aggravating circumstances to be subject to the prohibition against double jeopardy. Whether the State intended to rely on the same statutory circumstances was irrelevant to the determination of the case; the concern was that the first jury had heard the evidence and apparently had found nothing sufficient to warrant imposition of the death penalty. On the other hand, in this case the original sentencing jury obviously found evidence sufficient to warrant imposition of the death penalty.

This Court in Bullington did not alter the long-standing decisions of the Supreme Court of Georgia that statutory aggravating circumstances are not elements of the capital crimes charged, nor are they part of the facts involved in the proof of the capital crimes whose death sentences they accompany. Aggravating circumstances are procedural guidelines to be used in deciding whether to execute a person already convicted of a capital crime. The purpose is to increase the rational nature of the discretionary sentencing deliberation. See, e.g., Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1973). ". . . [S]tatutory aggravating circumstances . . . are not offenses within the meaning of the double jeopardy clause but are charged a jury in order to guide them in their determination of whether a defendant should be given a life or death sentence." Redd v. State, 242 Ga. at 885 (emphasis in original).

As the Supreme Court of Georgia noted in reinstating the death penalty:

> . . .The Georgia death penalty statute only requires a finding of one aggravating circumstance in order to impose the death penalty . . ., and the jury in

this case was so instructed. The jury's decision with regard to aggravating circumstances is not a mutually exclusive one as it is with regard to the choice of life or death. Consequently, we cannot say, as the Supreme Court did with regard to the choice of life or death, that the listing of only one of the three aggravating circumstances in support of the death penalty is an "acquittal" of the other two. The procedural basis which led the court to its decision in Bullington does not exist in this case.

Zant v. Redd, supra, slip opinion at 3-4. The court continued:

> Aggravating circumstances are procedural standards designed to control a jury's discretion in capital cases in order to ensure against capricious and arbitrary enforcement of the death penalty [citing Gregg v. Georgia, 428 U.S. 153, 197-98 (1976)]. Aggravating circumstances are not substantive"penalties" or "offenses"; they do not place the defendant's life in peril or subject him to a possible "conviction"; they are standards which guide a jury's decision on what does place the defendant['s] life in jeopardy at the sentencing trial -- the death penalty.

> As we have determined that double jeopardy does not apply to aggravating circumstances, we apply the established double jeopardy rule to the sentencing phase of Redd's trial, i.e., that on a trial on guilt or innocence, if a defendant is found guilty and convicted but overturns his conviction on legal grounds, the slate is wiped clean, the conviction nullified, and the state and the defense start anew. [Citations omitted]

Id. at 5.

When an accused has received the death penalty and has had the punishment set aside, the state should be able to have the trial court charge on any aggravating circumstance which is supported by the evidence. The language of Ga. Code Ann. § 27-2534.1(b) requires it:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider . . . any of the following statutory aggravating circumstances which may be supported by the evidence . . . . (Emphasis supplied)

For the trial court not to charge on an aggravating circumstance supported by the evidence is to lend credence to the charge that juries are given unguided discretion in deciding whether to impose the death penalty.

Therefore, it has been made clear by the Supreme Court of Georgia that under Georgia's death penalty statute, statutory aggravating circumstances are not offenses or elements of offenses but are guidelines to guide the jury in the exercise of its discretion in determining punishment as required by previous decisions of this Court. See, e.g., Gregg v. Georgia, supra. "Consequently, on resentencing the State may again seek the death penalty and may offer any evidence on aggravating circumstances in support thereof. Likewise, the defendant is entitled to bring to the jury any mitigating circumstances available to him, including those not known or utilized at the first sentencing trial. . . . [I]n this case the state acted properly in offering proof of statutory aggravating circumstances submitted to the first jury but not listed by that jury in support of the death sentence." Zant v. Redd, supra at 6.

CONCLUSION

No sufficient reason having been presented the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daryl A. Robinson, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper address and adequate postage to:

Mr. Stanley C. House
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Post Office Box 1565
Augusta, Georgia 30903

This 9th day of July, 1982.

Daryl A. Robinson
DARYL A. ROBINSON